131-172

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1527.

EX PARTE: IN THE MATTER OF HANS NIELSEN, APPELLANT,

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE TERRITORY OF UTAH.

FILED MARCH 21, 1889.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 22, 1889.

1 In the District Court for the First Judicial District of the Territory of Utah, County of Utah.

In the Matter of the Application of HANS NIELSEN for a Writ of *Habeas Corpus.*

Petition.

The petition of Hans Nielsen respectfully shows that he is now a prisoner confined in the custody of Frank H. Dyer, United States marshal in and for the Territory of Utah, in the penitentiary of said Territory, in the county of Salt Lake, in said Territory, for a supposed criminal offense against the United States, to wit, adultery.

Your petitioner also shows that said confinement is by virtue of the judgment warrants and proceedings of record, including two indictments against your petitioner, his arraignment thereon, pleas thereto, respectively, as well as decisions thereon and verdicts of the jury, being the record of said matters in the said district court of the first judicial district of the Territory of Utah, copies of all of which are hereto annexed and marked, respectively, Exhibits A, B, C, D, E, F, G, H, and I.

Your petitioner furtner shows that under the first of said judgments, a copy of which is marked Exhibit D, and in execution
2 thereof he has been imprisoned in the penitentiary aforesaid for and during the entire term mentioned in said judgment, and that he has fully satisfied the same, including the fine and costs awarded and assessed against him; that he is now imprisoned in said penitentiary under the second of said judgments, a copy of which is marked Exhibit I.

Your petitioner further states that he is advised and verily believes that his imprisonment is illegal, and that said illegality consists in this, that the court had no jurisdiction to pass judgment against your petitioner upon more than one of the indictments or records herein mentioned, for the reason that the offense therein charged is the same as that contained and set out in the other of said indictments and records, and that the court had no authority to impose two penalties for the same offense; that by his said imprisonment your petitioner is being punished twice for one and the same offense.

Wherefore your petitioner prays a writ of *habeas corpus* to the end that he may be discharged from custody.

HANS NIELSEN.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Hans Nielsen, the petitioner above named, being duly sworn, says that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HANS NIELSEN.

Subscribed and sworn to before me this 14th day of March, A. D. 1889.

JAMES H. MOYLE,
Notary Public.

[NOTARIAL SEAL.]

EXHIBIT A.

Indictment for Unlawful Cohabitation.

UNITED STATES OF AMERICA, *Territory of Utah, First Judicial District,* } *ss:* No. —.

In the First Judicial District in and for the Territory of Utah, within the United States of America, of the Term of September, in the year of our Lord one thousand eight hundred and eighty-eight.

THE UNITED STATES OF AMERICA
against
HANS NIELSON.

The grand jurors of the United States of America within and for the district aforesaid, at the term and in the Territory aforesaid, being duly empanelled, sworn, and charged, on their oaths do find and present that Hans Neilson, late of said district, heretofore, to wit, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers days thereafter and continuously between the day last aforesaid and the thirteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, then and there did unlawfully claim, live, and cohabit with more than one woman as his wives, to wit, with Anna Livina Nielson and Caroline Nielson, whose names are to the jury otherwise unknown, against the form of the statute of the United States in such case made and provided and against the peace and dignity of the same.

ALVIN L. ROBINSON,
Foreman of the Grand Jury.

D. EVANS,
Ass't U. S. Dist. Att'y.

(Endorsed:) No. 547. First district court, Territory of Utah. The United States of America against Hans Nielsen. Indictment for unlawful cohabitation. A true bill. Alvin L. Robinson, foreman of the grand jury. Presented in open court by the foreman of the grand jury, and in its presence filed by me this 27th day of September, 1888. H. H. Henderson, clerk, by B. Bachman, Jr., deputy clerk. Witnesses examined before the grand jury: Anna Lavina Nielsen, Caroline Nielsen, Chris. Clawson, R. C. Clawson. Sept. 28, 1888, defendant arraigned. Sept. 29, 1888, plead guilty.

EXHIBIT B.

Arraignment.

UNITED STATES
vs.
HANS NIELSEN. } Nos. 547 & 750.

In these causes the defendant herein, having been duly arraigned at the bar in open court, and on said indictment being read to him, was given until Sept. 29 to plead thereto.

Dated September 28, 1888.

(Signed) J. W. JUDD, *Judge.*

EXHIBIT C.

Plea to Indictment No. 547 for Unlawful Cohabitation.

UNITED STATES
vs.
HANS NIELSEN. } No. 547.

In this cause now comes the said defendant and, to the indictment heretofore read to him, pleads thereto guilty; thereupon it
6 was ordered by the court that sentence be passed on Nov. 19, 1888.

Dated Sept. 29, 1888.

(Signed) J. W. JUDD, *Judge.*

EXHIBIT D.

Judgment on Indictment No. 547 for Unlawful Cohabitation.

UNITED STATES
vs.
HANS NIELSEN. } No. 547.

Defendant being present in court, thereupon the court renders its judgment: That whereas said defendant, Hans Nielsen, having been duly convicted in this court of the crime of unlawful cohabitation, it is therefore ordered, adjudged, and decreed that the said defendant, Hans Nielsen, be imprisoned in the penitentiary of the Territory of Utah, at the county of Salt Lake, for the term of three months and to pay a fine of one hundred dollars and the costs herein, taxed at $44.50, and to stand committed until said fine and costs are paid.

Dated November 19, 1888.

J. W. JUDD, *Judge.*

EXHIBIT E.

Indictment for Adultery.

UNITED STATES OF AMERICA, *Territory of Utah, First Judicial District.* } ss: No. —.

In the First Judicial District in and for the Territory of Utah, within the United States of America, of the Term of September, in the year of our Lord one thousand eight hundred and eighty-eight.

7 THE UNITED STATES OF AMERICA *against* HANS NIELSEN.

The grand jurors of the United States of America within and for the district aforesaid, at the term and in the Territory aforesaid, being duly empanelled, sworn, and charged, on their oaths do find and present that Hans Nielsen, late of said district, heretofore, to wit, on the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, in the said district, Territory aforesaid, and within the jurisdiction of this court, then and there did unlawfully and feloniously commit adultery with one Caroline Nielsen, whose name is to the jury otherwise unknown, by then and there having carnal knowledge of the body of her, the said Caroline Nielsen, he, the said Hans Nielsen, then and there being a married man and having a lawful wife alive, and he, the said Hans Nielsen, not then being married to the said Caroline Nielsen, against the form of the statute of the said United States in such case made and provided and against the peace and dignity of the same.

D. EVANS,
Ass't U. S. Dist. Att'y.

ALVIN L. ROBINSON,
Foreman of the Grand Jury.

(Endorsed:) No. 750. First district court, Territory of Utah. The United States of America *against* Hans Nielsen. Indictment for adultery. A true bill. Alvin L. Robinson, foreman of the grand jury. Presented in open court by the foreman of the grand jury and in its presence filed by me this 27th day of September, 1888.
H. H. Henderson, clerk, by B. Bachman, Jr., deputy clerk.
8 D. Evans, assistant U. S. attorney. Witnesses examined before the grand jury: Anna Lavina Nielsen, Caroline Nielsen, Chris. Clawson, R. C. Clawson. Sept. 28, 1888, defendant arraigned. Sept. 29, 1888, defendant plead not guilty, and former conviction.

EXHIBIT F.

Arraignment.

UNITED STATES } Nos. 547 & 750.
vs.
HANS NIELSEN. }

In these causes the defendant herein, having been duly arraigned at the bar in open court, and on said indictment being read to him, was given until Sept. 29 to plead thereto.

Dated September 28, 1888.

(Signed) J. W. JUDD, *Judge.*

EXHIBIT G.

Plea to Indictment No. 750, for Adultery.

UNITED STATES } No. 750.
vs.
HANS NIELSEN. }

In this cause comes the said defendant and to the indictment heretofore read to him pleads thereto not guilty; and defendant further pleads that he has already been convicted of the offense charged in this indictment by his plea of guilty entered to indictment No. 547.

Dated September 29, 1888.

J. W. JUDD, *Judge.*

9 EXHIBIT H.

Plea of Former Conviction, Trial for Adultery, and Verdict.

UNITED STATES } No. 750.
vs.
HANS NIELSEN. }

This cause coming on regularly for trial, U. S. District Attorney George S. Peters appearing for the United States and F. S. Richards, S. R. Thurman, and George Sutherland for the defendant, the latter's counsel moves the court that the defendant be allowed to enter a further plea herein in bar of conviction under this indictment, which being allowed by the court, said defendant enters the following oral plea: Now comes the defendant and, protesting that he is not guilty of the offense charged herein, pleads that the United States ought not to further prosecute the said indictment against him, because he has already been convicted of the offense charged in this indictment by the judgment of this district court of the first judicial district of Utah Territory, rendered at the city of Provo, in the county and Territory of Utah, on the 19th day of November, 1888.

And, for a further specification of his plea, the said defendant says that the grand jury of this court for the September term of the year

1888, duly empanelled, charged, and sworn to enquire of offenses against the United States within the jurisdiction of this court, on the 28th day of September, A. D. 1888, presented and filed in this court in due form two indictments against this defendant in the words and figures following, to wit:

10 UNITED STATES OF AMERICA, } ss: No. —.
Territory of Utah, First Judicial District, }

In the First Judicial District in and for the Territory of Utah, within the United States of America, of the Term of Sept., in the year of our Lord one thousand eight hundred and eighty-eight.

THE UNITED STATES OF AMERICA *against* HANS NIELSEN.

The grand jurors of the United States of America within and for the district aforesaid, at the term and in the Territory aforesaid, being duly empanelled, sworn, and charged, on their oaths do find and present that Hans Nielsen, late of said district, heretofore, to wit, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers days thereafter, and continuously between the day last aforesaid and the thirteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, then and there did unlawfully claim, live, and cohabit with more than one woman as his wives, to wit, with Anna Lavina Nielsen and Caroline Nielsen, whose names are to the jury otherwise unknown, against the form of the statute of the said United States in such case made and provided and against the peace and dignity of the same.

D. EVANS,
Ass't U. S. Dist. Att'y.

ALVIN L. ROBINSON,
Foreman of the Grand Jury.

11 (Endorsed:) First district court, Territory of Utah. The United States of America against Hans Nielsen. Indictment for unlawful cohabitation. A true bill. Alvin L. Robinson, foreman of the grand jury. Presented in open court by the foreman of the grand jury and in its presence filed by me this 27th day of September, 1888. H. H. Henderson, clerk, by B. Bachman, Jr., deputy clerk. Witnesses examined before the grand jury: Anna Lavina Nielsen, Caroline Nielsen, Chris. Clawson, R. C. Clawson. September 28, 1888, defendant arraigned. Sep. 29, 1888, plead guilty.

UNITED STATES OF AMERICA, *Territory of Utah, First Judicial District,* } *ss:* No. —.

In the First Judicial District in and for the Territory of Utah, within the United States of America, of the Term of Sept., in the Year of our Lord one thousand eight hundred and eighty-eight.

THE UNITED STATES OF AMERICA *against* HANS NIELSEN.

The grand jurors of the United States of America with- and for the district aforesaid, at the term and in the Territory aforesaid, being duly empanelled, sworn, and charged, on their oaths do find and present that Hans Nielsen, late of said district, heretofore, to wit, on the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, in the said district, Territory aforesaid, and within the jurisdiction of this court, then and there
12 did unlawfully and feloniously commit adultery with one Caroline Nielsen, whose name is to the jury otherwise unknown, by then and there having carnal knowledge of the body of her, the said Caroline Nielsen, he, the said Hans Nielsen, then and there being a married man and having a lawful wife alive, and he, the said Hans Nielsen, not then being married to the said Caroline Nielsen, against the form of the statute of the said United States in such case made and provided and against the peace and dignity of the same.

D. EVANS,
Ass't U. S. Dist. Att'y.

ALVIN L. ROBINSON,
Foreman of the Grand Jury.

(Endorsed:) No. 750. First district court, Territory of Utah. The United States of America against Hans Nielsen. Indictment for adultery. A true bill. Alvin L. Robinson, foreman of the grand jury. Presented in open court by the foreman of the grand jury and its presence filed by me this 27th day of September, 1888. H. H. Henderson, clerk, by B. Bachman, Jr., deputy clerk. D. Evans, ass't U. S. att'y. Witnesses examined before the grand jury: Anna Lavina Nielsen, Caroline Nielsen, Chris. Clawson, R. C. Clawson. Sept. 28, 1888, defendant arraigned. Sept. 29, 1888, defendant plead not guilty, and former conviction.

That said two indictments were both found against said defendant upon the testimony of the same witnesses examined before said grand jury on one oath and one examination as to the alleged offense during the entire time mentioned in said indictment for unlawful cohabitation (No. 547), and upon the testimony of the same witnesses given on one examination covering the whole time specified in both of said indictments.

13 That on the 28th day of September, 1888, this defendant was arraigned in this court on each of said indictments, and on the 29th day of September, 1888, he pleaded guilty to the offense of unlawful cohabitation, as charged in the first of said indictments

(No. 547), and on the same day, to the second of said indictments (No. 750) charging him with adultery, pleaded that he had already been convicted of the offense charged in said indictment by his plea of guilty entered to said indictment No. 547 for unlawful cohabitation, and he also entered a plea of not guilty to said indictment No. 750.

That on the 19th day of November, 1888, this court pronounced and entered its judgment and sentence against this defendant on his plea of guilty to said indictment for unlawful cohabitation (No. 547) and adjudged that he be imprisoned in the Utah penitentiary for the term of three months and pay a fine of one hundred dollars and costs, which said judgment is of record in this court and has never been set aside or reversed, but has been fully satisfied.

That this defendant is the identical person charged in said two indictments; that Caroline Nielsen, the woman named in said second indictment (No. 750) as the person with whom the alleged adultery was committed, is the same person named in said first indictment (No. 547) as one of the women with whom the defendant was living and cohabiting as husband and wife during the period stated in said last-named indictment, and such cohabitation with her was an essential part of said offense of unlawful cohabitation.

That this indictment charges the defendant with committing
14 adultery with said Caroline Nielsen a day prior to the finding of said indictment for unlawful cohabitation, which cohabitation continued without intermission from the earliest date mentioned in said last-named indictment (No. 547) up to the date of finding said indictment, and that the offense charged in both of said indictments is one and the same offense and not divisible, and that the defendant has suffered the full penalty prescribed by law and the judgment of this court therefor.

Wherefore defendant prays to be discharged and to have this prosecution dismissed.

To which said plea of defendant the said United States district attorney demurs, for the reason and on the grounds that said plea does not state facts sufficient in law to be a bar to the further prosecution of this indictment; which said demurrer to said plea is submitted to the court for decision; and the court now, being fully advised in the premises, does consider that said demurrer and the grounds therein stated is well taken, and that the same ought to be sustained, and the court orders that the said demurrer be, and the same is hereby, sustained; to which ruling and order of the court said defendant, by his counsel, duly excepts. Said defendant being in court ready for trial, the following jury was called, to wit: Soloman D. Chase, Jr., Phillip Marx, Henry Adamson, Abner Crane, William Kershaw, Fred. Meakin, James Mynders, Raleigh Jones, John Whitbeck, Joseph D. Jones, Thomas Jarvis, and Lars Thursen, good and lawful men, who, being duly empanelled and sworn to well and truly try the cause, sat together and heard the testimony of the witnesses in the case; and said cause being submitted without argument by counsel, said jury heard the instructions of
15 the court, retired from the bar in charge of a sworn officer to

consider their verdict, and subsequently returned into court, and, being called, answered to their names, and on their oaths, say:

We, the jurors empanelled in the above cause, find the defendant, Hans Nielsen, guilty as charged in the indictment.

JOHN WHITBECK, *Foreman.*

Whereupon the court fixes Tuesday, the 12th day of March, 1889, as the time for passing sentence.

EXHIBIT I.

Judgment on Indictment No. 750, for Adultery.

At a stated term of the district court for the first judicial district of the Territory of Utah, held, at the court-room of said court, at the city of Provo, county of Utah, and Territory of Utah, on the 12th day of March, A. D. 1889.

Present: The Hon. J. W. Judd, judge.

UNITED STATES *against* HANS NIELSEN. } No. 750. Judgment for Adultery.

The defendant, with his counsel, came into court. Defendant was then asked if he had any legal cause to show why judgment should not now be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment:

That whereas said defendant, Hans Nielsen, having been duly convicted in this court of the crime of adultery, it is
16 therefore ordered, adjudged, and decreed that the said Hans Nielsen be imprisoned in the penitentiary of the Territory of Utah, at the county of Salt Lake, for the term of one hundred and twenty-five days.

You, said defendant, Hans Nielsen, are rendered into the custody of the United States marshal for the Territory of Utah, to be by him delivered into the custody of the warden or other proper officer of said penitentiary.

You, said warden or other proper officer of said penitentiary, are hereby commanded to receive of and from said United States marshal him, the said Hans Nielsen, convicted and sentenced as aforesaid, and him, the said Hans Nielsen, to safely keep and imprison in said penitentiary for the term as in this judgment ordered and specified.

J. W. JUDD, *Judge.*

Filed March 15th, 1889.

H. H. HENDERSON, *Clerk,*
By B. BACHMAN, JR.,
Deputy Clerk.

17 In the District Court for the First Judicial District of Utah Territory.

In the Matter of the Application of HANS NIELSEN for a Writ of *Habeas Corpus.*

Order.

The petition of Hans Nielsen for a writ of *habeas corpus* having been presented to the court, with the exhibits attached as a part thereof, and the court having fully considered the application and petition and the exhibits attached, finds that the facts alleged and shown by the petition and exhibits are insufficient to authorize the issuance of the writ, and the court being of the opinion from the allegations and facts stated in the petition and exhibits that if the writ be granted and a hearing given that the petitioner could not be discharged from custody, it is ordered and adjudged by the court that the said application for a writ of *habeas corpus* be, and the same is hereby, refused; to which rulings and refusal applicant, by his counsel, excepts.

By the court:

J. W. JUDD, *Judge.*

Dated March 15th, 1889.

Filed March fifteenth, 1889.

H. H. HENDERSON, *Clerk,*
By B. BACHMAN, JR.,
Deputy Clerk.

18 In the District Court for the First Judicial District of Utah Territory.

In the Matter of the Application of HANS NIELSEN for a Writ of, *Habeas Corpus.*

On motion of F. S. Richards, on behalf of petitioner, to be allowed an appeal to the Supreme Court of the United States from the order made herein this day, and for an order fixing the amount of the undertaking upon such appeal, it is ordered that the petitioner be allowed an appeal herein to the Supreme Court of the United States, and that such appeal be allowed upon an undertaking in the sum of three hundred dollars being filed and approved.

By the court:

J. W. JUDD, *Judge.*

Dated March 15th, 1889.

Filed March 15th, 1889.

H. H. HENDERSON, *Clerk,*
By B. BACHMAN, JR.,
Deputy Clerk.

19 Know all men by these presents that we, James Jack and Angus M. Cannon, of the city of Salt Lake and county ot Salt Lake, in the Territory of Utah, are held and firmly bound unof Frank H. Dyer, United States marshal in and for said Territory, in the full and just sum of three hundred dollars, to be paid to the said Dyer, his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1889.

Whereas at a term of the district court of the first judicial district in the Territory of Utah, in a suit depending in said court between Hans Nielsen and Frank H. Dyer, United States marshal as aforesaid, upon an application for a writ of *habeas corpus*, judgment was rendered against the said Hans Nielsen, and the said Nielsen having in open court at said term obtained the allowance of an appeal from said judgment of said district court to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said Hans Nielsen shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES JACK. [SEAL.]
ANGUS M. CANNON. [SEAL.]

Sealed and delivered in the presence of—
ARTHUR WINTERS.
F. S. RICHARDS.

20 Approved March 15, 1889.

J. W. JUDD, *Judge.*

Filed March 15th, 1889.

H. H. HENDERSON, *Clerk,*
By B. BACHMAN, JR.,
Deputy Clerk.

21 *Certificate.*

TERRITORY OF UTAH, } ss:
County of Utah, }

I, H. H. Henderson, clerk of the district court for the first judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the original petition of Hans Nielsen for a writ of *habeas corpus*, with the Exhibits A, B, C, D, E, F, G, H, and I thereto attached and made a part thereof; also order refusing the writ, order allowing the appeal to the Supreme Court of

the United States and fixing the amount of bonds, and the undertaking on appeal approved by this court in the above-entitled cause, filed in my office.

Seal United States of America, Territory of Utah, 1st Judicial District.

Witness my hand and the seal of said court, hereunto affixed at Provo, in the county and Territory of Utah, this 15th day of March, A. D. 1889.

H. H. HENDERSON, *Clerk*,

By B. BACHMAN, JR.,

Deputy Clerk.

Endorsed on cover: Utah Territory, fiirst judicial district court. No. 1527. Ex Parte: In the matter of Hans Nielsen, appellant. Filed March 21, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888. No. 1527.

Ex parte: **In the Matter of Hans Nielsen, Appellant.**

Appeal from the First Judicial District Court of Utah Territory.

MOTION TO ADVANCE CAUSE.

Appellant, by his counsel, moves to advance this cause, under Rule 26, sub-division 3, and asks that it be assigned for argument at the earliest practicable date.

The record shows that this is a criminal case; that appellant is in confinement in the penitentiary of Utah Territory; that on the 27th day of September, 1888, he was indicted in the First District Court of Utah Territory for unlawful cohabitation with two women, covering the period from October 15, 1885, to May 13, 1888, which unlawful cohabitation, as appears by said record, continued without intermission from the said 15th day of October, 1885, to the time of finding said indictment, to wit, Sept. 27, 1888; that he was convicted on said indictment and

punished by fine and imprisonment; that on September 27, 1888, the same day he was indicted for the above-named offence, and by the same grand jury, he was also indicted for adultery alleged to have been committed with one of the same women mentioned in the first-named indictment, with whom he was charged to have committed the unlawful cohabitation aforesaid, and the time of this alleged adultery was laid in the indictment as being on the 14th day of May, 1888, a day when said cohabitation was continuing. The said record further shows that the petitioner when arraigned on said last named indictment plead that said offense was one and indivisible, and by reason of the facts set forth in said record, he having been convicted under the said indictment for unlawful cohabitation, could not again be punished for adultery committed with one of the same women, during the continuance of said cohabitation, because such alleged adultery was a part of said offense of unlawful cohabitation, for which he had suffered the penalty of the law and satisfied the judgment of the court. The court below held otherwise; the appellant was convicted on said indictment for adultery and sentenced to imprisonment in the Utah penitentiary, where he is now serving out his sentence, and, as he claims, being punished twice for the same offense.

That on the 15th day of March, 1889, appellant by petition applied to the First Judical District Court of Utah Territory to issue a writ of *habeas corpus* to bring him before the said court, for inquiry into the legality of his sentence and imprisonment; that the said court refused to grant the writ upon the ground that the facts alleged and shown by the petition and the exhibits are insufficient to authorize the issuance of the writ, and because the said court was of opinion, from the allegations and facts stated

in the petition and exhibits, that if the writ be granted and a hearing given the petitioner could not be discharged from custody.

Appellant, by his counsel, excepted to this refusal and appealed to this Court, which appeal was allowed. The appeal is claimed under section 1909 of the Revised Statutes, and under other laws. The record has been printed.

JEREMIAH M. WILSON,
FRANKLIN S. RICHARDS,
for the Appellant.

WASHINGTON, D. C., *April* 2, 1889.

FILED
APR 12 1889
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1527. 131-176

Ex Parte: In the Matter of

HANS NIELSEN, Appellant.

BRIEF FOR APPELLANT.

JEREMIAH M. WILSON,
FRANKLIN S. RICHARDS,
SAMUEL SHELLABARGER,
For Appellant.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1527.

Exparte: In the Matter of Hans Nielsen, Appellant.

Brief for the Appellant.

This is an appeal from a final order of the district court for the first judicial district of the Territory of Utah, refusing to issue a writ of *habeas corpus* applied for by the petitioner, in his petition and exhibits thereto annexed (Record, pages 1–9), wherein he prayed to be discharged from custody on a judgment and sentence rendered and imposed by the said district court for the first judicial district of Utah Territory on the 12th day of March, A. D. 1889. (Record, page 9.) The petition for the writ was presented on the 15th day of March 1889, and the order refusing to issue it was made and entered on the same day. (Record, page 10.) The appeal to this Court was allowed by the district court and perfected on the said 15th day of March, 1889 (Record, pages 10 and 11), pursuant to section 9 of the Organic Act of Utah, and section 1909 of the United States Revised Statutes, which read as follows:

"SECTION 9. *And be it further enacted*, That the judicial power of said Territory shall be vested in a Supreme

Court, district courts, probate courts, and in justices of the peace. * * * A writ of error or appeal shall also be allowed to the Supreme Court of the United States, from the decisions of the said supreme court created by this act, or of any judge thereof, upon any writ of *habeas corpus* involving the question of personal freedom; * * * and the said supreme and district courts of the said Territory, and the respective judges thereof, shall and may grant writs of *habeas corpus* in all cases in which the same are granted by the judges of the United States in the District of Columbia.

"§ 1909. * * * A writ of error or appeal shall be allowed to the Supreme Court of the United States from the *decisions* of the supreme courts of Territories, or of any judge thereof, or of the district courts, or of any judge thereof, *upon writs of* habeas corpus *involving the question of personal freedom.*"

STATEMENT OF THE CASE.

On the 19th day of November, 1888, the petitioner, Hans Nielsen, was convicted in the district court of the first judicial district of Utah Territory on an indictment for unlawful cohabitation, found and presented in said court on the 27th day of September, 1888, which said indictment charged that "on the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-five, * * * and on divers days thereafter, and continually between the day last aforesaid and the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, then and there [he] did unlawfully claim, live, and cohabit with more than one woman as his wives, to wit: with Anna Lavina Nielsen and Caroline Nielsen" (Record, page 2), and he was sentenced on said indictment to be imprisoned in the penitentiary of the Territory of Utah for the term of three months and to pay a fine of $100 and costs (Record, page 3), which said judgment

and sentence was executed and satisfied. This indictment was found under section 3 of chapter 47 of an act of Congress approved March 22, 1882, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," which section reads as follows:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

On the 27th day of September, 1888, at the same time that the petitioner was indicted for unlawful cohabitation as aforesaid, the same grand jury presented an indictment against him for adultery, alleged to have been committed on the 14th day of May, A. D. 1888, with Caroline Nielsen, one of the women named in the indictment for unlawful cohabitation and with whom that offense was alleged to have been committed. (Record, page 4.) This indictment for adultery was found under section 3, chapter 397 of an act of Congress of March 3, 1887, entitled, "An act to amend an act entitled an act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," which section reads as follows:

"SEC. 3. That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a wo-

man who is unmarried, the man shall be deemed guilty of adultery."

The said two indictments were both found on the testimony of the same witnesses, before the same grand jury, on one oath and one examination as to the alleged offense, during the entire time embraced in both of said indictments, and without any discrimination between the different periods covered by the respective indictments, in respect to the conduct of the defendant supposed to constitute the unlawful cohabitation and adultery. (Record, page 7.)

After having been imprisoned during the time prescribed in the judgment of the court, on the indictment for unlawful cohabitation, and, having satisfied that judgment, on the 7th day of March, 1888, the defendant was put on trial on the indictment for adultery. (Record, page5.) He interposed a plea of former conviction, and averred that the unlawful cohabitation and supposed adultery constituted one offense, which was indivisible, and by reason of the facts set forth in said record, he having been convicted under the said in dictment for unlawful cohabitation, could not again be punished for adultery committed with one of the same women, during the continuance of said cohabitation, because such alleged adultery was a part of said offense of unlawful cohabitation, for which he had suffered the penalty of the law and satisfied the judgment of the court. (Record, pages 5–8.) The plea was demurred to by the Government on the ground that it did not state facts sufficient in law to be a bar to the pending prosecution. (Record, page 8.) The court sustained the demurrer, and the appellant was convicted on said indictment for adultery and sentenced to one hundred and twenty-five days' imprisonment in the Utah penitentiary, where he is now serving

out his sentence, and, as he claims, being punished twice for the same offense. (Record, page 9.)

When the petition for a writ of *habeas corpus* was presented to the court below, the defendant was serving out the second term of imprisonment; and it was to test the legality of his sentence as to such second indictment that the writ was applied for. If the judgment and sentence for the second term of imprisonment was unlawful by reason of the former conviction, the defendant was entitled to the writ and to be discharged from further custody.

ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to issue the writ and in holding that upon the facts stated in the petition the petitioner was not entitled to be discharged.

2d. The Court erred in holding that the adultery charged was not embraced in the offense of unlawful cohabitation for which the petitioner had been convicted.

QUESTION ARISING ON THE APPEAL.

Is the charge of adultery, as appears in this record, for which the appellant is now imprisoned, such that it is in law a part of the same offense as the unlawful cohabitation for which he was previously convicted and punished?

If so, the Court exhausted its jurisdiction when it rendered judgment on the indictment for unlawful cohabitation, and the sentence for adultery is void. Appellant is being twice punished for the same offense.

When a prisoner is held under a judgment of the court made without authority of law, the proper tribunal will issue a writ of *habeas corpus* to look into the record so far

as is necessary to ascertain that fact, and, if it is found to be so, will discharge the prisoner.

In Re Snow, 120 U. S., 274.
Ex-parte Lang, 18 Wall., 163, 178.
Ex-parte Milligan, 4 Wall., 2, 131.
Church on Habeas Corpus, sections 348, 362, 363.

ARGUMENT.

WHEN THE TWO INDICTMENTS ARE FOR MATTERS ARISING OUT OF THE SAME TRANSACTION, THERE CAN BE BUT ONE CONVICTION.

"A transaction is a group of facts so connected together as to be referred to by a single legal name," as in this case by the name of *unlawful cohabitation.*

"Every fact which is part of the same transaction is deemed to be relevant to the facts in issue."
Stevens' Digest of Evidence, page 6, article 3.

"A judgment is a bar to every fact that was actually in issue or which might have been put in issue or litigated. It is conclusive proof of what was decided or might have been decided."
Stevens' Digest of Evidence, page 92, article 43.
Id., pages 82, 89, and notes.
See also Farrington *v.* Payne, 15 Johns., 432.

"In principle, and according to the better authority, while one act may constitute as many distinct offenses as the legislature may choose to direct, for any one of which there may be a conviction without regard to the others, it is, in the language of Cockburn, Chief Justice, '*A fundamental rule of law that out of the same facts a series of charges shall not be preferred.*' To give our constitutional provision the force evidently meant, and *to render it effec-*

tual, 'the same offense' must be interpreted as equivalent to the same criminal act."

1 Bish. Crim. Law (7th ed.), sec. 1060.

4 Blackstone's Commentaries, 336.

In the case of Roberts *et al. v.* State (14 Georgia, 8), the appellants were indicted for robbery. They plead in bar a former conviction for burglary, which they averred to be the same felony for which they were then indicted. To this plea the Solicitor General demurred, denying its sufficiency in law to operate as an acquittal of the defendants. The plea was overruled by the court; the appellants were put on trial and convicted. The Supreme Court in its opinion adopts the rule, "*that a plea of* AUTREFOIS ACQUIT *or* CONVICT *is sufficient, whenever the proof shows the second case to be the same transaction with the first,*" and reverses the judgment of the trial court because "the trans action referred to in the indictment for burglary is the same as that in the prosecution for robbery."

In the case of State *v.* Cooper (13 New Jersey Law, 361), the appellant was indicted and tried for the crime of murder. He plead in bar a former conviction for arson, to which the prosecution demurred and the plea was overruled. The Supreme Court held that the plea of former conviction was valid, and said:

"If a person, whilst doing, or attempting to do, another act, undesignedly kill a man, if the act done, or attempted, were a felony, the killing is murder, especially if death were the probable consequence of the act. The common law, as well as the statutes of this State, declares that no persons shall be subject for the same offense to be twice put in jeopardy of life. *This great principle forms one of the strong bulwarks of liberty. The pleas of* AUTREFOIS ACQUIT *and* AUTREFOIS CONVICT *are founded on this principle.* * * * A defendant cannot be convicted and punished

for two distinct felonies growing out of *the same identical act.*"

In the case of State *v.* McCormack (8 Oregon, 236), the appellant was indicted for stealing a saddle and bridle and was convicted and punished therefor. At the same term of court he was also indicted for the crime of larceny in stealing a horse belonging to the same person, at the same time and place mentioned in the first indictment. To the second indictment the appellant plead in bar the former conviction. The appellate court held that the plea of former conviction was valid, and, page 239, said :

"This is a case where the appellant is charged with the larceny of a horse, saddle and bridle taken at the same time and place, and from the same person, and in our opinion *the whole transaction constitutes but one crime, and but one indictment can be sustained for such taking*, and the prosecution having seen proper to split up the transaction into two offenses, by causing two indictments to be prefered against such person for that which is but one crime, a conviction or acquittal of one may be successfully pleaded as a bar to a subsequent prosecution on the other."

In the cases of Jackson *v.* State and Laupher *v.* State (14 Indiana, 327), the defendants were charged with stealing two horses. It appeared in evidence that with the horses they stole saddles and bridles. It was claimed that there was a fatal variance. The court held that this was not so, and said :

"A conviction or acquittal on the indictment as drawn would bar another prosecution for the same larceny. The State cannot split up one crime and prosecute it in parts. *The prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.*"

To the same effect is the case of *Quitzow* v. *State* (1 Texas Appeals, 47), where the court holds that a prosecution for stealing a horse bars a prosecution for stealing a saddle and bridle taken at the same time, because *it was one transaction*. The court said :

"The prosecutor had a right to carve as large an offence out of this transaction as he could, yet must carve only one."

In the case of State *v.* Locklin (59 Vermont, 654), the appellant had been indicted for disturbing the peace by tumultuous and offensive carriage, and by assaulting one Martin Hill. On the trial he plead in bar a former conviction of an assault on one Herman Hill. The appellate court sustained his plea and, in the opinion, page 655, said :

" The respondent's plea set forth another indictment for an assault upon Herman Hill of the same date with the one under consideration. The one under consideration is for an assault upon Martin Hill. The plea alleges that the assault charged in the present indictment is ' a part of one and the same breach of the peace ' charged in the former indictment, for which he has been convicted ; and that the assault charged in the present indictment was ' incident to and a part of the assault ' for which he has been convicted, and prays for a discharge from the present indictment. The allegations of the plea are admitted by the demurrer. The substance of the whole plea is that the offense with which the respondent is charged in the present indictment is part of the offense for which he has been indicted and punished. As *the whole includes all the parts*, in legal effect, the plea alleges that the respondent has been already punished for the offense charged in the present indictment, and this is admitted by the demurrer. Whether the plea is true, in fact, we have no occasion or right to inquire. If it is not, the State should have trav-

ersed it. As admitted by the demurrer it, in legal effect, alleges that the respondent has already been punished for the very offense charged in the present indictment, in the conviction on the former indictment."

In the case of Hinkle *v.* Commonwealth (4 Dana, 518), the court held that—

"Although the setting up of a gaming table may alone be an indictable offense, the keeping of such a table, and the inducing of any person to bet upon it, another, when each shall have been committed by different persons, or at different times; nevertheless, as they are co-operating *acts constituting altogether one offense*, when committed by the same person, at the same time, an indictment for that combined act in violation of law may properly charge the whole in one count; and but one punishment can be inflicted, as for one offense."

In the case of State *v.* De Graeffenreid (9 Baxter, 289), where the appellant had been indicted for larceny and plead in bar a former conviction for burglary with intent to commit larceny, *it being one transaction*, the court held that a conviction for burglary, with intent to commit larceny, was a bar to an indictment for the commission of larceny and, in its opinion, page 288, the court quoted the following language of Chief-Justice Waite:

"I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act has been committed, every part of which may be alleged in a single count of the indictment and proved under it, *the act cannot be split into several distinct crimes*, and a separate indictment sustained on each; and whenever there has been a conviction on one part, it will operate as a bar on any subsequent proceedings as to the residue."

In the case of the United States *v.* Burch (1 Cranch C. C.) the court held that—

"The keeping of a disorderly house is a single offence, and a conviction is a bar to a prosecution for keeping a disorderly house at any time prior to the finding of the indictment."

In the case of the Commonwealth *v.* Hudson (14 Gray, 11) the appellant was indicted for an unlawful sale of intoxicating liquor, and on the trial, the evidence showed that he had already been acquitted on the charge of being a common seller at the same time that the unlawful sale was alleged to have been made. The court said:

"It is true that the court has held that conviction on a charge of being a common seller of spirituous liquors, from a certain day named to a certain other day, and a conviction thereon is a bar to a subsequent prosecution for a single sale within the period named in the charge of being a common seller. In such case the government have had a conviction for an offense, which, if established by the verdict and judgment thereon, is a merger of all the single sales within the period named in the indictment.

"The question then arises whether the like effect follows in the case of an acquittal upon such charge of being a common seller. In the opinion of the court it does not. Such acquittal is entirely consistent with the fact having been shown of one or two single sales by the defendant, but a failure to show the third sale or evidence sufficient to convict of the offense of being a common seller. The party may therefore have been properly acquitted of the larger offense while he was guilty of the minor one, of the single sale. Nor does it vary the result that this single sale may have been in evidence before the tribunal that heard and determined the alleged offense of being a common seller, inasmuch as for the reasons already suggested such acquittal for one, a proof of being a common seller has no tendency to show that the proof was not full and satisfactory of this single sale. The acquittal of being a common seller was therefore no acquittal of this single sale for which this party has now been convicted.

See Commonwealth *v.* Jenks, 1 Gray, 490.

Commonwealth *v.* Mead, 10 Allen, 396.

In the case of State *v.* Egglesht (41 Iowa, 574), several indictments were found by the same grand jury against the appellant for uttering and publishing forged checks, and others for forgery. After conviction upon one of these indictments, the appellant was put on trial for another. He plead the former conviction, which was overruled by the trial court. The Supreme Court sustained the plea, and said:

"Whether certain criminal acts constitute one crime or more, must depend upon the nature and circumstances of the acts themselves. When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime or he committed four. *It is not competent for the State, at its election, by the form of the indictment, to give to defendant's act the quality of one crime or of four, at pleasure.* The act partakes wholly of the one character or wholly of the other. * * *

"It is urged by the appellee that if the State had failed to prove the forgery of the check described in the first indictment tried there would have been an acquittal, and that it is a dangerous rule to allow such acquittal to be pleaded in bar to a subsequent prosecution for uttering another check, since it would thereby be placed in the power of the defendant to secure a trial upon the indictment under which he knows no conviction could be had, and then plead the judgment of acquittal as a bar to the other indictments. But *the State can and should prevent the happening of any such contingency, by charging the uttering of all the checks offered at the same time, in one indictment and as but one offense.* When this is done, the proof that any one of the checks was known to be forgery will support the indictment."

In the case of State *v.* Lindley (14 Ind., 430), the appellant was prosecuted for keeping a gaming-house. He moved to quash the information on the ground that he had

already been tried on a charge of keeping and maintaining the same house as a gaming-house, and that both informations were filed on the same day. The court sustained the motion to quash, and said:

"All the time during which a given house is continuously thus kept, prior and up to the prosecution for the keeping, constitutes *one indivisible offense*, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed."

In the case of State *v.* Nutt (28 Vermont, 598), the appellant was indicted for selling intoxicating liquor without license, during the period for which he had been convicted of being "a common seller." The evidence showed that both violations of law were prior in time to the filing of the complaint upon which the former conviction was had. The court held that the former conviction, for being a common seller, was a conclusive bar to any prosecution grounded upon any one act of sale, prior to the making of the complaint, and, in its opinion, said:

"If the Government see fit to go for the offense of being a "common seller," and the respondent is adjudged guilty, it must, in a certain sense, be considered as a *merger* of all the distinct acts of sale, up to the filing of the complaint, and *the respondent cannot be punished but for one offense.* * * * The jury should have been told that it was a conclusive bar as to all sales made prior to filing the complaint."

In the case of State *v.* Commissioners (2 Murphey, 371), three indictments were presented against the appellants for not keeping the streets of the town in repair. Being convicted on one indictment they plead that conviction in

bar of the others. The Supreme Court held that the plea was good, and said:

"It would be monstrous to charge them with separate indictments for every street in the town, when the whole were out of repair at the same time. Were such a doctrine tolerated, it is impossible to say where its consequences would end. * * * *This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced.*"

II.

IT IS NOT NECESSARY THAT THE OFFENCE IN EACH INDICTMENT SHOULD BE THE SAME IN NAME, IF THE TRANSACTION IS THE SAME.

"Another proposition about which there is no dispute, is that to make the offence the same, the two indictments need not be, in exact language, alike."

1 Bish. Crim. Law (7th ed.), sec. 1050.

"In view of the general clause found in all the State constitutions, and in the Federal Constitution, to the effect that no one shall be twice put in jeopardy of life and limb for the same offense, it becomes an important question how far the legislature can go in providing punishments for an act forbidden; whether it may split up the transaction and provide punishment for the different phases of it, or whether there can be only one punishment. *It may be stated as a rule, however, that the phrase 'same offense' signifies the same criminal act or omission, and not the same offense in name only;* that the legislature cannot declare punishable different phases of one act by declaring each phase of it to be in name a separate crime. If the legislature could split up a single act and make it a series of criminal violations

of the law, this provision of the Constitution would be practically annulled."

7 Crim. Law Magazine, page 713.

In the case of Hirshfield *v.* State (11 Texas Appeals, 207), the appellant was convicted of swindling on an indictment setting forth all the elements constituting the offense of uttering a forged instrument. He excepted to the indictment; the exception was overruled by the trial-court and he was convicted. The judgment was reversed, and the appellate court held that—

"No person shall be twice put in jeopardy for *the same act or omission, whether the offense be the same* EO NOMINE *or not.* A conviction of the swindling in this case can be pleaded in bar to a prosecution for uttering a forged instrument."

In the case of Holt *v.* State (38 Georgia, 187), the appellant had been indicted for an assault, with intent to murder, and had been discharged; subsequently a second indictment was found charging him and others with the offense of aggravated riot. The former acquittal was pleaded in bar. The appellate court, page 189, said:

"The plea alleges that the defendants are now indicted for the same acts as charged in a former indictment, for which they have been acquitted, and the demurrer to the plea admits the truth thereof. If the defendants have been legally acquitted for the same criminal acts, under the first indictment, as are now charged against them in the second indictment, it is extremely difficult to perceive upon what principle they can be twice tried for the same criminal acts, although technically it may not be for the same offense in name. *Can the State put a party on trial the second time for the same criminal act, after he has been acquitted, by changing the name of the accusation? If it can, then his constitutional protection does not amount to much. The*

effort here is to avoid the provision of the Constitution by changing the name of the offense. The record shows that the defendants have been indicted the second time for the same identical criminal acts for which they have been acquitted; the reply is, that you are not indicted for the same criminal offense; therefore, the former indictment and acquittal is no bar. If the State thinks proper, by its prosecuting officer, to indict a party for an assault with intent to murder, upon a given state of facts, and upon the trial thereof the defendant is acquitted, can the State then prefer another indictment, alleging precisely the same state of facts (with the exception of the malicious intent), and put the party again upon his trial for the same criminal acts by altering the name of the offense? The State, having made its election as to the nature and character of the offense, for which it will prosecute the party upon a given state of facts, if, upon the trial, a defendant is acquitted, ought not the State to be bound by its election, and not be permitted again to indict and prosecute the defendant for the same criminal acts, under the name of another offense? The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation for the same criminal acts with which he is charged the second time? *If he has, then he has been put in jeopardy within the true intent and meaning of the Constitution, and cannot be tried a second time for the same criminal acts under the same or a different named offense.* To hold otherwise would be to hold that provision of the Constitution which declares 'nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb,' for all practical purposes, to be a mere shadow and delusion. These views are in accordance with the ruling of this court in Roberts and Copenhaven *v.* The State (14 Ga. Rep., 8). In that case this court stated the rule to be 'that a plea of *autrefois acquit or convict* is sufficient, whenever the proof shows the second case to be *the same transaction with the first.*' "

In the case of Moore *v.* State (71 Alabama, 307–311), the appellant was indicted for an assault, with intent to

commit murder, and interposed a plea of former conviction for an assault and battery, to which the prosecution demurred and the demurrer was sustained by the lower court. The appellate court, in its decision, said:

"We are clearly of the opinion that the plea was good, and the Court erred in sustaining the demurrer. It may be true that an acquittal of a minor offense will not, in all cases, operate to bar a greater. (1 Bish. Cr. Law, 6th ed., sec. 1059.) Hence, we sometimes find the general declaration anciently made, that 'an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanor, and *e converse*.' (Arch. Cr. Pl., 52; 2 Hawk., B. 2, C. 35, sec. 5.) But this must be understood to be true only of 'those cases in which the former charge did not necessarily include the latter.' (Chitty Cr. Law, 456.) The true rule seems to be that *if the minor offense is embraced within the major one, as a constituent element, or component part of it*, and on the trial of the one there can be a conviction of the other, then a former conviction or acquittal of the minor will bar the major. (Whart. Cr. Ev., 584; 1 Bish. Cr. Law, secs. 1055–1058.) This is certainly the general rule, subject, perhaps, to certain exceptions, either real or apparent. (1 Whart. Am. Cr. Law, secs. 563, 566.) If such were not the case, as suggested by Mr. Bishop, 'then the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest (offense); while, if he had begun with the largest, he must there stop—a conclusion repugnant to good sense.'" (1 Bish. Cr. Law, 6th ed., secs. 1057, 1055.)

"A conclusive reason for the soundness of this view, to our mind, is that if a defendant has been tried for the smaller offense—whether acquitted or convicted it is immaterial—and he is afterwards put on trial for the larger, he is twice in jeopardy for the smaller offense. The Declaration of Rights provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." (Const. 1875, art. 1, sec. 10.) The principle of *autrefois convict* or *acquit* is known to have been based upon the parallel principle of the common law forbidding, at least

in the established practice of the courts, that any one should be twice put in jeopardy for the same offense. (Wells' Res. Adj., sec. 408; 1 Bish. Cr. Law, secs. 981–982.) It was a universally admitted rule at common law, that *a conviction of manslaughter would bar an indictment for murder*, based upon the same act of homicide; for, observes Blackstone, "the fact prosecuted is the same in both, though the offense differs in coloring." (4 Black. Com., 336; 4 Coke, 45–46; 2 Hale, 246.) And the same principle has become the settled rule of the American courts, under statutes defining the crimes of murder and manslaughter. (1 Bish. Cr. Law, 6th ed., secs. 1056, 1068; *Brennan* v. *People*, 15 Ill., 511; *Hurt* v. *State*, 25 Miss., 378; *People* v. *Hunckeler*, 48 Cal., 331.) *The reason is that manslaughter is a component part of the crime of murder*, and if not guilty of the lesser offense, a defendant cannot be guilty of the greater, which is the same crime with the additional element of malice and design. So, when convicted of the lesser offense, if afterwards tried for the greater, he will be placed in jeopardy a second time for the lesser, for which he might be convicted under an indictment for the greater. (*State* v. *Cooper*, 1 Green (N. J.), 361, 372.) In *State* v. *Chaffin* (2 Swan, Tenn., 493), *this rule was applied to an indictment for assault and battery*, and it was held that one convicted of an assault only is protected thereby from prosecution afterwards for the battery. It was observed by the court that "the one is a necessary part of the other, and if he (the defendant) be now punished for the battery, he will thereby be twice punished for the assault." (1 Bish. Cr. Law, sec. 1058.) So it has been held by other courts, quite uniformly, that *where a defendant is convicted of an assault*, on an indictment for an assault and battery, or of an assault under an indictment for an assault with intent to murder, *he cannot afterwards be tried for the greater offenses*, the assault and battery, or the assault with intent to murder. (Whart. Crim. Ev., 534.) The case of *Commonwealth* v. *Miller* (5 Dana (Ky.), 320) presents a ruling analogous to the above authorities. It was there held that *a conviction of a breach of the peace*, before a

justice's court, *would bar an indictment* in the circuit court *for an assault and battery in the commission of such breach of the peace.* The decision was placed on the ground that a second prosecution would be violative of the principle that no person shall be twice punished for the same offense. In *State* v. *Johnson* (12 Ala., 840) it was decided that *two indictments, one for resisting legal process, and the other for an assault, cannot be supported where they are intended to cover essentially the same offense,* the decisive test being considered to be that the same testimony would support both charges.

"These decisions are, in our opinion, based upon sound legal principles. A single crime cannot be split up or subdivided into two or more indictable offenses (Drake *v.* State, 60 Ala,. 42). A series of criminal charges cannot, under our system of jurisprudence, be based upon the same offense or criminal act, at least so far as concerns the dignity of the same sovereignty (Regina *v.* Elrington, 9 Cox C. C., 86; State *v.* Damon, 2 Tyler (Vt.) 387; 2 Bish. Cr. L., 1060). If the State elects, through its authorized officers, to prosecute a crime in one of its phases, or aspects, *it cannot afterwards prosecute the same criminal act under color of another name.* It was forcibly said in Jackson *v.* State (14 Ind., 327, 328): 'The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.' Such was the view also taken in State *v.* Cooper (1 Gr., N. J., 361), where it was held that the prisoner's acquittal of the crime of arson, which resulted in the unintentional destruction of the life of a human being, was a good defense, under the plea of *autrefois acquit,* to an indictment charging him with the murder of the same person whose life was destroyed by the perpetration of the arson. It was said by the court that the two crimes charged were essentially the the same, the one being a necessary ingredient of the other, and to permit both prosecutions would be virtually to permit the prisoner to be twice put in jeopardy for the same offense; and that 'where the State has thought proper to prosecute the offense in its mildest form, it is better that

the residue of the offense go unpunished than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen.' See also Roberts *v.* State (14 Ga., 8); State *v.* Lewis (2 Hawks, N. C., 98); Foster *v.* State (39 Ala., 229); Harrison *v.* State (36 Ala., 248)."

III.

IF THE CONVICTION IS FOR THE WHOLE TRANSACTION, THERE CAN BE NO FURTHER CONVICTION FOR ANY PART OF IT.

"While the prosecutor may draw the indictment so as to cover the whole and entire criminal transaction, or may carve out of it any single and entire offense, yet he cannot after carving out such single offense, proceed to prosecute for the remainder of the transaction. *Only once can he prosecute. The State (prosecutor) cannot split up one crime and prosecute it in parts.* The prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime."

7 Crim. Law Magazine, page 713.

In the case of Wilcox *v.* State (6 Lee, Tenn., 571), the plaintiffs in error were convicted of an assault with intent to commit murder, and, upon the trial, plead a former conviction for robbery, which was not sustained by the trial court. A conviction was had, but the appellate court reversed the judgment, and, in its opinion, page 573, said:

"It was for the assault committed at the time of the robbery that the conviction was had in this case. * * * It was one continuous transaction, in which the defendants perpetrated a robbery, by violence, dangerously wounding the prosecutor. *Being one transaction*, the prosecutor may carve as large an offense out of it as he can, but it is said '*he must cut only once.*' 1 Bish. Cr. L., secs. 804, 891."

In the case of Wright *v.* State (17 Texas, 152), the ap-

pellant had been indicted for stealing cattle belonging to one Floyd, and had also been indicted for stealing cattle belonging to one Houston. On the first trial he was acquitted and on the second trial plead the former acquittal in bar. The court of appeals, in passing upon that question, pages 158 and 159, said:

"*Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of and must be sustained by the same proofs. *Autrefois convict* only requires that the transaction, or the facts constituting it, be the same. Suppose the defendant had been convicted in the first case for the theft of Houston's cattle, then, on the second, for the theft of Floyd's cattle he could plead a former conviction, and, if the evidence showed that *the transaction was a single one*—that is, that the cattle of Floyd and Houston were taken at the same time and place—his plea would be good and should prevail, because the transaction being one, the prosecution could carve but once, and having once carved and convicted it could not claim another conviction against the same party for the single offense. * * * *It is the doctrine of carving, a well-established principle of criminal law, which makes this distinction between the pleas* AUTREFOIS ACQUIT *and* AUTREFOIS CONVICT *where several ostensible crimes are covered by a single transaction.* But for this doctrine of carving, his plea of former conviction would not be maintained in law. * * * The accused cannot be convicted on separate indictments charging *different parts of one transaction* as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the others."

In the case of State *v.* Townsends (2 Harrington, 543), where a riot took place at a religious meeting, it was held by the court that "the rioters could not be indicted both for the riot and for disturbing a religious meeting, as the punishment for the former covered the latter offense." In its opinion, the court said:

"The plea of *autrefois acquit* is founded on the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation (4 Co. Rep., 40, 43; Hawk. b. 2, c. 26, s. 3, 35 s. 1; 4 Bl. C.) The plea of *autrefois convict* depends on the same principle, that no man shall be put in peril of punishment more than once for the same offense. *This is the spirit of the law and has been since Magna Charta.* It is also the spirit of the constitution of Delaware. It is the dictate of justice as well as humanity."

In the case of Fisher *v.* Commonwealth (1 Bush., 211), two indictments were found against the appellant, one of them charging him with having stolen a horse, the property of Patrick Harlines, and the other with having stolen from the same party a wagon and harness. The same time was laid in both indictments. The appellant was acquitted on his trial under the first indictment and entered a plea of *autrefois acquit* on the second trial, which was overruled by the court, and he was thereupon convicted. The appellate court held that the plea of former acquittal was good, and, page 214, said:

"We do not regard the two indictments as for different grades of the same offense, nor for distinct and independent offenses, but *different offenses arising out of one and the same transaction*, having most of their constituent elements in common with each other, either of which may have been the subject of a conviction by proving the entire transaction; and yet, one of them having resulted in either a conviction or an acquittal, no conviction could be had as to the other without producing the same transaction in evidence."

In the case of Dinkey *v.* Commonwealth (17 Penn. State, 126), the plaintiff in error had been indicted for fornication and bastardy. On the trial he plead a former acquittal on an indictment for seduction with the same

woman. The Supreme Court sustained the plea, and, in its opinion, delivered by Chief-Justice Black, held that—

"A party indicted for seduction and acquitted may plead such acquittal in bar of a subsequent indictment for fornication and bastardy founded on *the same act;* and the record will be a complete defense."

In the case of State *v.* Chaffin (2 Swan, 493), the appellant was indicted for an assault and battery, to which he plead a former conviction for assault upon the same person. The Court sustained the plea, and said:

"The battery includes the assault, and for the assault the defendant has received the legal punishment. He cannot now be punished for the battery, because it cannot be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery, he will thereby be twice punished for the assault; that is, be twice punished for the same offense, which, of course, cannot be done."

In the case of Commonwealth *v.* Hawkins (11 Bush., 603), the appellant was indicted for an assault and battery. He plead in bar a former conviction for a breach of the peace. The Supreme Court sustained the plea and said:

"This question came before this Court in 1837 in the Commonwealth *v.* Miller (5 Dana, 370), and it was then held, though not without some hesitation, that a conviction for a breach of the peace, unless obtained by a fraud or collusion of the party pleading, was a bar to an indictment for an assault and battery committed in the breach of the peace for which the defendant had been fined. Since that time the subject has been repeatedly passed upon by courts of last resort, both in this country and in England, and we think the decided weight of authority is in accord with the former decision of this Court."

In the case of Wininger *et al. v.* State (13 Ind., 540), the defendants, being prosecuted for a *riot*, plead a former conviction for *assault and battery* committed at the same time. The appellate court sustained the plea, because the assault was included in *the same transaction* and involved in the riot.

In the case of Fiddler *v.* State (7 Humphrey, 508), the plaintiff in error had been indicted and tried for gaming by *betting on a horse race.* To this indictment he plead in bar a former conviction for *running a horse* along a public road. To this plea the Attorney-General demurred, the court sustained the demurrer, and fined the defendant. It was contended by the Attorney-General that there were two distinct offenses, but the Court held otherwise, and reversed the judgment of the lower court.

In the case of Sanders *v.* The State (55 Alabama, 42), the appellant was indicted for an assault and battery, and plead in bar a conviction under an indictment for maltreatment of the person upon whom the assault was alleged to have been committed. The Court held that the former conviction for maltreatment, by chaining the appellant to a plow, was a bar to this conviction for an assault and battery, because *both charges grew ont of the same transaction.*

IV.

IF THE CONVICTION IS FOR A PART OF THE TRANSACTION, THERE CAN BE NO FURTHER CONVICTION, EITHER FOR THE WHOLE OR FOR ANY PART OF THE TRANSACTION.

In the case of State *v.* Lewis (2 Hawkes, 98), the appellant was indicted for *robbery*, and also for burglary and *larceny*, based upon the same felonious taking ; and on the last indictment he was convicted of larceny. When the

prisoner was arraigned on the indictment for robbery, that indictment was quashed, and an appeal was taken by the attorney-general. The appellate court sustained the action of the court below.

In the case of Dixon *v.* The Corporation of Washington (4 Cranch C. C., 114), where the appellant had been sued for six penalties for keeping a faro-table, the court held that *the keeping of a faro-table was a single offense, although continued from day to day for many days;* that all the keeping previous to the issuing of the warrant constitutes the one offense, and that the recovery of one penalty would be a bar to all prosecutions for acts of keeping a faro-table done previous to the issuing of the warrant.

In the case of the United States *v.* Lee (4 Cranch C. C., 446), the appellant was convicted of *stealing a pocket-book*, and was afterwards indicted for *stealing a note which was in the pocket-book at the time of the theft.* The court instructed the jury that "if, from the evidence, they should find that the note was in the pocket-book when it was stolen by the defendant, and that he had been convicted of stealing the pocket-book, they ought to find their verdict for the defendant; which they did."

In the case of State *v.* Shepard (7 Conn., 54), where the appellant had been convicted on an indictment for an assault, with intent to commit rape, the supreme court held that the *conviction on the indictment for attempting to commit rape was a good bar to an indictment for rape.*

In the case of People *v.* McGowan (17 Wendell, 386), the appellant was indicted for grand larceny, and, on the trial, plead in bar a former acquittal on an indictment for committing robbery. The supreme court held that *the acquittal for robbery was a bar to an indictment for larceny*, where the property alleged to have been taken was the same.

In the case of Regina *v.* Elrington (9 Cox C. C., 86), the appellants were charged with a common assault and acquitted. Subsequently they were indicted in respect of the same transaction. They plead the former acquittal in bar, which plea was sustained by the appellate court, and Chief-Justice Cockburn, in rendering the decision, said:

"I am of opinion that there must be judgment for the defendants. We cannot speculate upon hypothetical cases when we are dealing with a demurrer. Upon the facts as stated, it appears that there was an information before justices for a common assault. Upon the hearing of that information it was dismissed by them, and they granted their certificate under the statute. The prosecutor then prefers an indictment in respect of the very same transaction, and the defendants then plead a former conviction and certificate as a bar. Now, in the act of assault, Parliament expressly enacts, when the justices dismiss an information for a common assault, they may grant a certificate, which is to be a bar to all further or other proceedings, civil or criminal, for the same cause. Then how was it in this case? Here the magistrates did hear the information, and they dismissed it and gave a certificate. There is, then, an indictment preferred, and not only is there a count for common assault, but in respect of *the very same transaction* two other counts are added, merely varying the character of the assault. Now, upon this very question we have two decided cases, Reg. *v.* Walker and Reg. *v.* Stanton, in both of which the learned judges held that the former proceeding upon the information before the justices was a bar to an indictment founded upon the same assault. I think those decisions were correct. There may possibly be some inconvenience occasionally arising out of this state of the law, as referred to by Mr. Ribton; but *it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.*"

In the case of State *v.* Colgate (31 Kansas, 511), the ap-

pellant was convicted of arson in burning a mill and was afterwards indicted for setting fire to and burning books of account, which were in the mill at the time it was burned. To the second indictment he plead in bar a former conviction under the first, and the appellate court sustained the validity of the plea and said:

"Upon general principles a single offense cannot be split into separate parts, and the supposed offender be prosecuted for each of such separate parts, although each part may of itself constitute a separate offense. If the offender be prosecuted for one part, that ends the prosecution for that offense, provided such part of itself constitutes an offense for which a conviction can be had. And generally we would think that the commission of *a single wrongful act can furnish the subject-matter or foundation of only one criminal prosecution.* Thus in *Iowa* it has been held that where a person uttered at a bank several forged checks at one time and by the same act, he committed but one offense, and that a conviction for uttering one of the checks was a bar to a conviction upon the others." (The State *v.* Egglesht, 41 Iowa, 574; same case, 20 Am. Rep., 612.)

"In *Connecticut* it has been held that where a person has in his possession at the time several forged bank-notes of different banks, with the intent to pass them, and thereby defraud the person who might take them, and also to defraud the several banks, such facts constitute only one offense, and a conviction founded upon the possession of any part of such bank-notes will bar a prosecution founded upon the possession of any other part of the same. (The State *v.* Benham, 7 Conn., 414.)

"In *New York* it has been held that where a defendant has been acquitted of the offense of forging and counterfeiting certain endorsements on a promissory note, he cannot be again tried for uttering and publishing as true such endorsements. (The People *v.* Allen, 1 Parker's Crim. Rep., 445.)

"In *Vermont* it has been held that where a person by one

blow wounds two men, a conviction for the assault and battery charged to have been committed on one of them is a bar to an indictment for the assault and battery as committed on the other. (The State *v.* Damon, 2 Tyler, 387.)

"In *Indiana* and *Alabama* it had been held that where a person kills two other persons by the same act, he has committed only one crime, and if convicted for the homicide of one of them, he cannot afterward be tried for the homicide of the other. (Clem *v.* The State, 42 Ind., 420; same case, 13Am. Rep., 369; Ben *v.* The State, 22 Ala., 9.)

"Upon the same subject, and substantially to the same effect, see Womack *v.* The State (7 Coldwell, 509).

"In *Ohio* it has been held that where several articles of property are stolen at the same time, the transaction being the same, the larceny of the whole of the articles, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense. (The State *v.* Hennessy, 23 Ohio St., 339; same case, 13 Am. Rep., 253.)

"In *Texas* it has been held that the stealing, at the same time and place, of several articles belonging to different persons is but one offense, and a conviction for the larceny of one of such articles is a bar to an indictment for the larceny of another. (Wilson *v.* The State, 45 Texas, 76; same case, 23 Am. Rep., 602.) To the same effect see Hudson *v.* The State, 9 Tex. Ct. App., 151; same case, 35 Am. Rep., 732; Rex *v.* Jones, 4 Car. & P., 217; Jackson *v.* The State, 14 Ind., 327; Lorton *v.* The State, 7 Mo., 55; The State *v.* Williams, 10 Humph., 101; Fisher *v.* The Commonwealth, 1 Bush., 211; The People *v.* McGowan, 17 Wend., 386.

"In *Kentucky* it has been held that although the setting up of a gaming table is one offense, and the keeping of a gaming table and inducing others to bet thereon is another offense, yet that when they are both committed by one person and at the same time they are but one offense, and may be set forth in one count, and will authorize but one punishment. (Hinkle *v.* The Commonwealth, 4 Dana, 518.)

"In *Tennessee* it has been held that a conviction for running a horse race is a good defense to a prosecution for betting on the same race. (Fiddler *v.* The State, 7 Humph., 508.)

"In *Georgia* it has been held that a conviction for burglary will bar a prosecution for robbery, where the two prosecutions were admitted to be founded upon the same transaction, and the court laid down the broad doctrine that *one prosecution will bar another whenever the proof shows the second case to be the same transaction with the first.* (Roberts *v.* The State, 14 Ga., 8.) And in the same State it was held that a conviction for burglary will bar a prosecution for robbery, if the circumstances of the robbery were put in proof in order to make out the case for which the prisoner was tried and convicted on the first indictment, because in such case the robbery constituted a part of the same transaction for which the prisoner was first tried. (Copenhaven *v.* The State, 15 Ga., 264.)

"In *North Carolina* it has been held that a conviction for larceny, upon an indictment for burglary and larceny, will bar another prosecution for robbery where the robbery and the larceny were for the felonious taking of the same goods. (The State *v.* Lewis, 2 Hawks, 98.)

"In *New York* it has been held that an indictment charging as a single act the burning of a number of designated dwelling-houses charges but one offense. (Woodford *v.* The People, 62 N. Y., 117; same case, 20 Am. Rep., 464.) Substantially to the same effect, see Commonwealth *v.* Squire (42 Mass., Met., 258).

"In *New Jersey* it has been held that where a person has been convicted of arson he cannot afterwards be tried on an indictment for the murder of a person whose death was alleged to have been caused by the arson. (The State *v.* Cooper, 1 Green, N. J. Law, 461; same case, 25 Am. Dec., 490.)

"In almost every public offense, if not in every one, several separate and distinct facts may enter in to constitute the offense. These facts may exist contemporaneously with the wrongful act or acts of the offender, or they may take place subsequently, and often in succession, as

succeeding consequences of the wrongful act or acts. Where a person commits a single larceny by stealing several articles, the facts are all contemporaneous; but where a person commits an act that results in murder, the murder may not be completed, or indeed may not exist, for days or months or even a year afterward, when the injured person dies. This is also true to some extent with regard to arson: the fire may be set to one article, and may then spread from article to article, not reaching all the articles for many hours afterward; and yet the defendant may be guilty, and generally is guilty for the burning of every article which is burned in consequence of the fire which he at first wrongfully kindles. In other words, a person who commits arson as to one thing is generally guilty of arson as to every other thing which takes fire and burns as the natural and probable consequence of the defendant's wrongful act. (1 Bishop's Crim. Law, 329, and cases there cited; see also the following cases, not cited by Bishop: Rex *v.* Cooper, 5 Car. & P., 535; The Commonwealth *v.* Wade, 34 Mass., 395; Hennessy *v.* The People, 21 How. Pr., 239.)"

IV.

IF THE ADULTERY OCCURRED DURING THE UNLAWFUL COHABITATION WHICH IS COVERED BY THE CONVICTION, IT WAS A PART OF AND INVOLVED IN SUCH COHABITATION, AND A CONVICTION FOR THE LATTER BARS A PROSECUTION FOR THE ADULTERY.

The statute under which the indictment for unlawful cohabitation was framed was enacted with especial reference to polygamous marriages in Utah. By that statute a new offense was created, the offense of *unlawful cohabitation*. It was made an offense to live with more than one woman as a wife. The statute, as construed by the courts, pre-supposes that the marriage relation exists with more than one woman, and its object was to prevent the living

together of the parties in such plural marriage relations. This court, in the case of Cannon *v.* The United States (116 U. S., page 71), said: "It (the statute) refers wholly to the relations between men and women *founded on the existence of actual marriages* or *on the holding out of their existence;*" and in the same case, speaking of section 4 of the act, which provides for joining in the same indictment, offenses named in sections 1 and 3, page 71 the court said: "This certainly has no tendency to show that the cohabitation referred to is *one outside a marital relation, actual or ostensible.*"

In the same case, the objection having been made that the indictment was defective in that it did not charge that "the cohabitation was with the women as wives or as persons held out as wives" (page 77), the court held that such an averment was unnecessary, as it was covered "*by the allegation of cohabiting with them.*"

It may therefore be taken as settled that this new offense of unlawful cohabitation has relation alone to cases where the plural marriage relation exists, either actually or ostensibly, and that the section has no relation whatever to cases of adultery, or to any association between the sexes, where the marriage is not claimed to exist. It only relates to cohabitation under an actual marriage, or an open claim or assertion of marriage.

It was so held by the supreme court of the District of Columbia, in the case of the United States *v.* Crawford (6 Mackey, 319), in which this statute was vainly attempted to be applied to the District of Columbia, and it has been so held by the courts in Utah.

Therefore, the statute applying alone to cases where the relation of husband and wife exists, and where the parties are cohabiting as such, that cohabitation is a "transaction," which is a "group of facts," one of which facts is sexual intercourse.

Such intercourse must therefore be presumed from such continuous living together in such a relation, and while it may not actually occur while the parties are thus living together, yet if it does occur it is a part of the transaction—one of the group of facts entering into that transaction. We respectfully submit that this is so from many well-known and obvious considerations.

Our entire social structure very largely rests upon this assumption of sexual relations between persons living as husband and wife. Upon that rests the presumption of legitimacy of children; and the law even goes so far as to make sexual intercourse a duty, a refusal to discharge which is deemed to be a flagrant breach of the marital obligation. It may be indelicate, and not creditable to mankind to assert it, but it is nevertheless true, that there is no fact in the "group of facts" constituting the "transaction" that is more conspicuous or controlling than this fact of sexual intercourse. We venture, therefore, to assert that, when it has occurred during the unlawful cohabitation, sexual intercourse must be regarded as a fact going to make up and constituting a part of the transaction which is denounced by this statute as unlawful cohabitation, although held by this court that such sexual intercourse is not an essential ingredient of the offense.

If this be so, then we are brought to the question whether, when a party has been convicted for unlawfully cohabiting, continuously, during a period of three years or less, he may be separately indicted and convicted for each act of sexual intercourse occurring during that period of continuous cohabitation; and our contention is that such acts of sexual intercourse are so inherently a part of the cohabitation that they cannot be severed from it, and made the subjects of separate indictments and the grounds of separate convictions, when the

party has been convicted for the unlawful cohabitation of which they are thus a part.

The authorities hereinbefore cited, and especially the one last referred to, the case of State *v.* Colgate (31 Kansas, 511), in which so many authorities are so usefully gathered together, conclusively establish that—

First. If the indictment is for a continuous transaction, it embraces the whole period covered by the transaction, whether all the period of the transaction is named in the indictment or not.

Second. If the act of the party involves or embraces what would severally be many offenses, yet that act, whether a single or continuing one, being in legal contemplation but one act, there can be but one conviction; as in such cases as where a horse, saddle, and bridle are stolen at one time, a conviction separately for the larceny of either is a bar to any subsequent prosecution for the larceny of the others; or, as in the case of an assault upon two or more persons, at the same time and by the same act, a conviction of the assault upon one is a bar to a conviction of an assault upon the other, or, as in the case of a "transaction," which is continuous, there can be but one conviction, (Snow's case, 120 U. S.), and this because the party has been guilty of a single act for which, alone, he can be punished.

And we submit that these authorities necessarily result in the establishment of a third proposition, which is this case, viz:

Third. If involved in or incident to the transaction of which he has been convicted, he has been guilty of an act which, if committed separately from the transaction, would be indictable, that act is embraced in the transaction, and it cannot be again made the subject of prosecution.

The case of State *v.* Cooper (1 Green, N. J., *supra*) most forcibly sustains this proposition.

In that case the party was convicted for arson. The firing of the building was the act with which he was charged and for which he was convicted. But in the burning of that building human lives were destroyed—the result of his act. Having been convicted of *arson*, that court held that an indictment for murder *could not be sustained* because the murder was *a fact* or *an offense* which he committed *when he committed the arson*, for which he had already been convicted.

If that case is a correct exposition of the law, as we maintain, it is conclusive as to this case, because sexual intercourse, as connected with an actual or ostensible marriage, is by far more inherently the result of the cohabitation than the burning to death of a human being is associated with or an essential part of the felonious burning of a building.

There is an obvious purpose or intent to commit the prohibited act in the case of cohabitation, while there is only the implied intent to murder in the other—that implication of law which presumes a party to intend the natural and probable consequence of his act—the setting fire to the building.

The doctrine laid down in the New Jersey case (*supra*) is sustained by the authorities from which we have quoted above.

It may be claimed that the rule we here contend for does not apply in this case, because it is not necessary to prove that sexual intercourse occurred during the cohabitation, and because this Court has held that sexual intercourse is not necessary to constitute the offense of unlawful cohabitation.

The answer to the first suggestion is found in the fact that neither was it necessary in the prosecution for stealing the horse to prove that the saddle and bridle were

stolen at the same time the horse was taken; nor was it necessary to prove on the trial for arson that the man was burned in the building that was fired; nor was it necessary where the party presented four forged checks to prove that he presented the three others when he was indicted and tried for uttering the remaining one. Yet in all such cases the one conviction is held to be a bar to subsequent convictions. They might have been proved as a part of the criminal act of the party, although such proof was not necessary. They might have been embraced in the indictment, but if they were not, the legal consequences are precisely the same as if they had been; just as in this case, the prosecution might have proved the fact that sexual intercourse occurred, to aid in establishing the charge of unlawful cohabitation; or that fact might have been charged in the indictment, as one of a series of acts constituting unlawful cohabitation.

And we submit that this is equally conclusive, as an answer to the suggestion that sexual intercourse is not necessary to the offense. Whether it is necessary or not, it occurred at the time, and was a part of the cohabitation. The burning of the man was not necessary to constitute the crime of arson, nor the stealing of the saddle and bridle necessary to the larceny of the horse.

The whole policy of the law is against the multiplication of offenses—splitting up transactions so as to multiply prosecutions—dividing or segregating what happened under one transaction into separate prosecutions.

In the language of the supreme court of North Carolina, "this notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced." This Court has forcibly condemned that mode of procedure in Snow's case (120 U. S., page 282), where an attempt was made to divide

a continuous cohabitation and prosecute different parts of it as separate and different offenses. This Court said:

"The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-five years and fines amounting to $44,400, and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that *a continuing offense* of the character of the one in this case *can be committed but once* for the purposes of indictment or prosecution, *prior to the time the prosecution is instituted.*"

Applying the same illustration in this case, if what we here contend for does not prevail, there could be a vast number of prosecutions instituted and maintained upon proof of facts and the presumptions arising therefrom, for intercourse occurring during a period of one continuous cohabitation of three years or less, *the penalties for which would aggregate hundreds of years of imprisonment.*

We therefore insist that in a case such as we have been considering, namely, where the sexual intercourse occurred during the period laid in the indictment charging unlawful cohabitation, there can be no further conviction for such sexual intercourse.

PRINCIPLE APPLIED TO THIS CASE.

Then, the next question is, whether in this particular case, as made by the record, the same principle will apply.

The record shows that in the indictment for unlawful cohabitation on which the petitioner was convicted, it is averred that the cohabitation began on the fifteenth day of October, 1885, and continued until the thirteenth day

of May, 1888. The indictment for adultery charges the act of adultery to have been committed on the fourteenth day of May, 1888, with one of the wives named in the indictment for unlawful cohabitation. These two indictments were found at the same time, Sept. 27, 1888, by the same grand jury and on the testimony of the same witnesses, at the same examination, and on the same oaths, covering the whole time included in both of the indictments.

In the plea to the indictment for adultery it is averred that the cohabitation, for which the defendant had been indicted and convicted, "continued without intermission from the earliest date mentioned" in the *cohabitation* indictment up to *the date these indictments were found;* thus bringing the alleged adultery within the time of this *continuing* cohabitation.

This plea was demurred to and the demurrer was sustained. It is therefore admitted by this demurrer that the fact is as above stated, to wit, that the petitioner *began cohabitation* with this woman *as his wife* on the 15th day of October, 1885, and so *continued to cohabit "without intermission" till the 27th day of September*, 1888, and that the alleged adultery was committed during that period, although a day after the last day mentioned in the cohabitation indictment.

The question therefore is, whether or not the prosecution, by naming a shorter period than that during which the cohabitation actually continued, can divide that cohabitation at pleasure, prosecute and convict for that part of the offense which they choose to call unlawful cohabitation, and in another indictment prosecute for an act of sexual intercourse that occurred during the continuance of that cohabitation, but during that portion of the period not embraced in the indictment for unlawful cohabitation.

If we are right in the proposition that the entire "*transaction*" is barred by a conviction on an indictment for the whole or a part of the period covered by it, and that sexual intercourse is to be considered in law as a part (although not an indispensable part) of the transaction of unlawful cohabitation, it seems to us that *it must irresistibly follow that no separate conviction could be had for any sexual act that occurred during the continuance* of such cohabitation, whether that act occurred during the portion of the time laid in the cohabitation indictment or not.

The cohabitation is a "fact," act, or "*transaction*" that can only be limited by the time of finding the indictment. The authorities are uniform that the prosecution cannot divide the period of a continuing offense; a prosecution for maintaining a nuisance, or for keeping a gaming house, and the like, are familiar illustrations of the principle here contended for. It is a principle that must apply to every continuing offense.

This principle was affirmed by this Court in the Snow case (120 U. S., page 282) in the following language:

"Taking the three indictments together, there is charged a continuing offense for the entire time covered by all three of the indictments. *There was but a single offense committed prior to the time the indictments were found.*"

Now, according to this record, that transaction, or that fact, or act of cohabitation, did continue without intermission until the 27th day of September, 1888, and this alleged act of adultery did occur during that continuance, and, unless this Court can affirm that a party may be convicted for every act of intercourse occurring during the entire period covered by a continuous cohabitation, and can be also convicted separately for the cohabitation, during which these acts occurred, it was legally impossi-

ble to convict in the case which is the subject of this controversy, and we most respectfully submit that to so affirm would be contrary to the established policy of the law, and to the spirit, if not the letter, of the Constitution.

Here the prosecutor was barred, by the decision of this Court in the Snow case, from sustaining more than one indictment for the continuous offense of unlawful cohabitation. Realizing that fact he "seeks to avoid the provision of the Constitution" and the effect of that decision "by changing the name of the offense." Certainly this cannot be done. Where two prosecutions for unlawful cohabitation would not be tolerated, separate indictments for cohabitation and adultery, growing out of the same transaction, cannot be sustained.

The strongest case against the doctrine for which we here contend is Morey *v.* The Commonwealth (108 Mass., 433).

In that case the party was charged in one indictment with lewd and lascivious cohabitation continually from October 1, 1866, to August 1, 1867, with Bridget Kennedy, "*they not being married to each other;*" and in another indictment he was charged with having committed adultery with the same woman on January 1, June 1, and August 1, 1867; these several acts being within the period during which the parties were alleged to have lewdly and lasciviously cohabited. Morey was convicted on the first indictment, and it was held that this did not bar a prosecution on the second. The court rested its decision on the proposition that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction upon another, unless the *evidence* required to support a conviction upon one of them would have been *sufficient* to warrant a conviction upon the other."

And to this proposition the court adds: "The test is not whether the defendant has already been tried for the

same *act*, but whether he has been put in jeopardy for the same *offense*."

There is a material difference between that case and the case now before this Court. In that case the element of actual or ostensible marriage did not exist, and the implication of sexual intercourse therefore did not necessarily arise. It might reasonably be suspected as a fact, but as the marital relation did not exist and was expressly negatived, there was no legal presumption of such intercourse, and it might be said that the one act did not involve the other and therefore the conviction of the one did not bar a prosecution for the other. Unless this is a substantial distinction between the two cases, the case of Morey *v.* The Commonwealth is certainly at variance with the current of authorities on this subject.

It cannot be reconciled with the arson case above cited, for the arson and murder are separate offenses; yet, when the party was convicted of arson, which was an act as well as a crime, it was held that he could not be convicted of a different offense, because he had been convicted of another offense committed by the same act which caused the offense of murder. The authorities cited in that case, having relation to different degrees of homicide, support our contention, because in such cases the different degrees of homicide are involved; and the cases do not support the proposition stated by the court. For example, murder is the killing with *malice aforethought*, an element that *must be proved* in order to convict. In manslaughter, this element is not required, and is not necessary to be proved; therefore the proof in the one case is different from that required in the other. In murder, that fact must be proved; in manslaughter it is not necessary to prove it. The evidence to procure a conviction of manslaughter would not be sufficient to procure a conviction of mur-

der; but the conviction for manslaughter is a bar to a conviction of murder, and, therefore, these cases do not support the proposition that "a conviction upon one indictment is no bar to a subsequent indictment unless the evidence required to support the one would have been sufficient to warrant a conviction upon the other." If that proposition were sound, then a party convicted of manslaughter might be subsequently convicted of murder, for the proof necessary to convict of the former would not be sufficient to convict of the latter.

It is because the one offense is involved in the other that the conviction of the one bars the conviction of the other; and this supports the views we are urging in this case.

But what seems to be more especially relied on to sustain the opinion of the court in the Morey case, *supra*, is a series of Massachusetts cases, cited to the effect that, keeping a tenement for the illegal sale, the illegal keeping of intoxicating liquors, the illegal selling of such liquors, are distinct offenses, and the conviction for one is not a bar to a conviction for either of the others, although the same acts of sale are relied upon in proof of each. Only Massachusetts decisions are cited in support of this, and they are not in harmony with the cases cited, *supra*, nor with the current of authority in the United States.

This case of Morey *v.* The Commonwealth has not met with approval. It would almost seem to come within the class of cases which Mr. Bishop says "are founded on principles which, if adopted throughout, would render practically void the constitutional inhibition." In a note to section 1061 of his work on Criminal Law (7th ed.) Mr. Bishop says:

"Some courts maintain that, in the words of Gray, J., 'A single act may be an offense against two statutes; and,

if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' (Morey *v.* Commonwealth, 108 Mass., 433, 434. And see Commonwealth *v.* Bakeman, 105 Mass., 53; Commonwealth *v.* Shea, 14 Gray, 386; Commonwealth *v.* McConnell, 11 Gray, 204.) But this question has been in effect, already considered in the text. (Ante, 1054 *et seq.*) *By all the authorities, this would not be so if the conviction was for the larger crime.* (Ante, 1054.) *And on the better reason and better authorities it would not be so if the conviction was for the smaller.* (Ante, 1057.) But the State could choose under which statute the one prosecution should be."

"Where crimes are included within one another, so that a higher comprehends whatever a lower one does and more, as explained in a previous chapter, a conviction for any higher one bars a prosecution for any lower; since, *if the defendant is guilty of all, he is necessarily so of each particular part. It is believed that there is no exception to this rule.* In general the same consequence follows an acquittal, because generally there can be a conviction for the lower on an indictment for the higher. But the effect of an acquittal is not, like that of a conviction, universally so."

1 Bishop's Crim. Law (7th ed.), sec. 1054.

FORMER ACQUITTAL AND FORMER CONVICTION.

There is a broad distinction between the effect of a plea of former acquittal and the effect of a plea of former conviction in such cases as the one we are now considering. This distinction is illustrated by the case of the horse race (Fiddler *v.* State, *supra*), in which it was held that the party having been convicted of the racing could not afterwards be convicted of betting on that race. But if he had been acquitted of the race, it would not have followed that he had not bet on the race, and he might have been con-

victed of the betting. So in the case of keeping a tippling house—the accused might be acquitted of the charge of keeping such a house, but it would not follow that he had not made an unlawful sale of liquor, and therefore the acquittal as to keeping the house would be no bar to a charge of making an unlawful sale; but on the contrary, if he was convicted of keeping the house, he could not be convicted afterwards for a sale made therein while he was so keeping it.

1 Bish. Crim. Law (7th ed.), sec. 1054.

In the case of the Commonwealth *v.* Hudson (14 Gray, 11) the appellant was indicted for an unlawful sale of intoxicating liquor. and on the trial, the evidence showed that he had already been acquitted on the charge of being a common seller at the same time that the unlawful sale was alleged to have been made. The court said:

"It is true that the court has held that conviction on a charge of being a common seller of spirituous liquors, from a certain day named to a certain other day, and a conviction thereon is a bar to a subsequent prosecution for a single sale within the period named in the charge of being a common seller. In such case the government have had a conviction for an offense, which, if established by the verdict and judgment thereon, is a merger of all the single sales within the period named in the indictment.

"The question then arises whether the like effect follows in the case of an acquittal upon such charge of being a common seller. In the opinion of the court it does not. Such acquittal is entirely consistent with the fact having been shown of one or two single sales by the defendant, but a failure to show the third sale or evidence sufficient to convict of the offense of being a common seller. The party may therefore have been properly acquitted of the larger offense while he was guilty of the minor one, of the single sale."

And so in this case, if the accused had been acquitted of the unlawful cohabitation, he might have been convicted for the sexual intercourse, under the indictment for adultery. This distinction reconciles apparent conflicts in the authorities.

"If, owing to the form of the allegation, or to the lower offense being a misdemeanor while the higher is a felony, there can be no conviction of the former on the indictment for the latter, *an acquittal of the latter will not bar a prosecution for the former. A conviction would bar it, because a necessary part of what the conviction covers.* But an acquittal may have been produced by the fact that the defendant simply committed the lower offense with no aggravations, and for this he was not in jeopardy when on trial for the higher."

1 Bish. Crim. Law (7th ed.), sec. 1055.

In the case of Simco *v.* The State (8 Texas Appeals, 406), the court draws the distinction between the plea of former acquittal and former conviction, as follows:

"The plea of *autrefois acquit* is only available where the transaction is the same, and the two indictments are susceptible of and must be sustained by the same proof; that of *autrefois convict* only requires that the transaction or the facts constituting it be the same."

See also Wright *v.* State, 17 Tex. App., 152.

JURISDICTION.

If the question of jurisdiction of this Court shall be raised, we cite the case of Snow (120 U. S.) in support of such jurisdiction, only adding that if the Court had no power to convict on the second indictment, because of having exhausted its power in the cohabitation case, then the jurisdiction of this Court is no longer open to ques-

tion. It was upon this ground that the jurisdiction in the Snow case was maintained.

See also *ex parte* Milligan, 4 Wall., 131.
Ex parte Lange, 18 Wall., 163, 178.
Ex parte Wilson, 114 U. S., 417.

CONCLUSION.

In concluding this brief, we repeat that the theory of this prosecution is contrary to the policy of the law. This is a criminal statute to which no rule of construction or principle of enforcement can be applied that is not applied to other criminal statutes. We would not be understood as suggesting a possibility, or even an apprehension of a possibility, that it will be dealt with in any different manner from other criminal statutes. Multiplication of punishments is not the policy of the law, and we cannot believe that it was the intention of Congress to punish a man by fine and imprisonment for living with a woman three years, as his wife, and then to add to that punishment, or make it possible to add to it, hundreds of convictions for sexual intercourse occurring during the period of, and being a part of the cohabitation, the punishment for which would be an aggregate of penal servitude that would require centuries of time to discharge.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

EX PARTE: IN THE MATTER OF HANS NIELSEN, APPELLANT. No. 1527.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE TERRITORY OF UTAH.

BRIEF FOR RESPONDENT.

In the Supreme Court of the United States.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

On the 15th day of March, 1889, the appellant applied for a writ of *habeas corpus* to the district court for the first judicial district of Utah. He alleged he had been first convicted of unlawful cohabitation, and punished, and afterwards was tried, convicted, and is now imprisoned, on a charge of adultery which was committed within the time laid in the first indictment; and that the same act was proven by the same evidence on the trial of the first and second cases. Having pleaded a former conviction in the

second case, he claims the court had no jurisdiction to sentence him on the second indictment. The writ of *habeas corpus* was refused, and the petitioner appealed to this court.

BRIEF OF ARGUMENT.

I.

The record in this case does not show want of jurisdiction in the court below, but only alleged errors of the court in the exercise of its jurisdiction.

Section 1910, Revised Statutes, gives to the district courts of the Territories the same jurisdiction in all cases arising under the laws of the United States as is vested in the circuit and district courts of the United States.

The third section of the act of the 19th of February, 1887 (24 U. S. Stats., 635), declares adultery a crime against the United States, and defines it.

The indictment sufficiently charges the crime, and was regularly found (Rec., p. 7). The court had jurisdiction to try the case set forth. No irregularities occurred in the course of the proceedings.

The defendant alleged as a defense, by plea, that he had been convicted of the same offense before, and by a plea set out the facts on which he relied to sustain the alleged former conviction. The United States demurred to the last plea, and the court, with full power to judge, sustained the demurrer. If the judgment of the court in sustaining the demurrer was wrong, it was an error, but the error was one of judgment. The judgment might be

voidable for error, but was not void for want of power. That judgment, until reversed for error, was conclusive alike on that court and this. (*Ex parte Watkins*, 3 Pet., 202.)

The court below which tried the cause, and to which this petition for *habeas corpus* was presented, could not on the application for *habeas corpus* review its own judgment for alleged errors committed when in the original cause it had full jurisdiction over the person, the place, and the cause.

The writ of *habeas corpus* should not be converted into a mere writ of error. (*Ex parte Parks*, 93 U. S., 18; *ex parte Carll*, 106 U. S., 521; *ex parte Bigelow*, 113 U. S., 228; Hurd on Habeas Corpus, 335–344.)

In Wharton's Crim. Pl. and Pr., sec. 477, the principle is thus stated:

> A former conviction for the same offense * * * cannot be put in evidence under the general issue, or avail in arrest of judgment or on *habeas corpus*.

Also see *Pitner* vs. *The State* (44 Tex., 578).

II.

The defendant was not placed twice in jeopardy for the same offense.

1. The offenses charged in the first and second indictments are not the same.

The first indictment charges unlawful cohabitation under the third section of the act of the 22d of March, 1882 (22 U. S. Stats., 31). Its descriptive language is, "hereafter cohabits with more than one woman."

The second charges adultery under the third section of the act of the 19th of February, 1887 (24 U. S. Stats., 635). Its descriptive language is, "whoever commits adultery."

The definition of adultery is:

> The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. (1 Bouvier's Law Dicty., 126.)

The essential elements of this crime are that the offender shall be married; that he or she shall have sexual intercourse with a person other than his or her husband or wife; that his or her husband or wife shall be living at the time of the act.

No one of these elements is essential to the offense of "unlawful cohabitation."

The word "cohabit" in the statute means "to be together as husband and wife."

The offense is to live with more than one woman, holding out to the world by word or deed that such women are the wives of the offender. Neither actual marriage nor sexual intercourse are essential elements of this offense.

These propositions are all sustained by the opinion of this court in the case of *Cannon* vs. *United States* (116 U. S., 55).

The fact that sexual intercourse is generally regarded as a probable concomitant of cohabitation or living together as husband and wife, does not legally warrant the inference that when an offender has been convicted of such offense sexual intercourse was proven at all. If a statute forbade drunkenness, because it was detrimental to the public peace, a conviction under such statute would

be no bar to a subsequent prosecution for a breach of the peace committed by an offender at the same time.

Unlawful cohabitation might afford great facilities for, and temptations to, commit adultery, but it is not adultery. To prevent these facilities, and the incident temptation, was doubtless one purpose Congress had in view in declaring the crime.

2. The first indictment is for a continuous offense. The time laid in it is—

> On the 15th day of October, 1885, * * * and on divers days thereafter, and continuously between the day last aforesaid and the 13th day of May, A. D. 1888. (Rec., p. 6.)

Under this indictment no evidence could have been admitted of any act done on the 14th day of May, 1888, nor on any other day later than the 13th.

In the case of the *Commonwealth* vs. *Robinson* (126 Mass., 262), Lord, J., delivering the opinion, said:

> In *Commonwealth* v. *Armstrong*, 7 Gray, 49, as well as in several other cases, it is decided that an indictment for being a common seller of intoxicating liquors from a day named to the day of finding the indictment is supported by proof of three sales made on any one day between the days named in the indictment. That case further decides that, although where the offence consists of but a single act, the day on which the act is alleged to have been committed is immaterial, if it appears to have been a day on which the offence charged might have been committed; yet where, on the other hand, the offence charged is continuous in its nature, and requires a series of acts for its commission, the time within which the

> offence is alleged to have been committed is material, and must be proved as alleged, so when a person is charged with an offence continuous in its nature and requiring for its commission a series of acts, and such offence is alleged to have been committed upon a single day, evidence of any facts tending to establish the offence at any other time than upon the day named is inadmissible.

The time laid in the second indictment is, "On the 14th day of May, 1888." (Rec., p. 7.)

There is no period of time that is common in the two indictments.

No evidence could have been given on the first indictment for any offense committed as charged in the second. The records therefore relied on by the petitioner do not show that he was placed twice in jeopardy, but show on the contrary *prima facie* he was not.

The burden of proving the identity of the offenses is on the defendant. (Wharton's Crim. Pl. and Pr., sec. 483.)

3. But even if the offense of "unlawful cohabitation" included one element of the crime of adultery, and both had been laid within the same time, it is not conceded that the petitioner was thereby placed twice in jeopardy.

In the case of *Moore* vs. *the People of the State of Illinois* (14 How., 20), it was claimed that a statute of Illinois, which forbade the holding of slaves, was in conflict with the provisions of the Constitution of the United States and the legislation of Congress on the subject of fugitive slaves. It was contended by the defendant that by virtue of the law under which he was indicted he was liable to be

subjected to two different punishments for the same offense. Ruling on this, Grier, J., delivering the opinion of the court, said:

> Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.

In the case of *Morey* vs. *The Commonwealth* (108 Mass., 433–436), the defendant had been indicted at the September term, 1867, for lewd and lascivious association and cohabitation with Bridget Kennedy. The offense was laid from the 1st day of October, 1866, and continuously to August 1, 1867. He was convicted. At the same term he was convicted for adultery with Bridget Kennedy, in which the dates laid were January 1st, June 1st, and August 1st, 1867. The court ruled he had not been twice

convicted of the same offense. The conclusion is thus stated by Gray, J., delivering the opinion:

> The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman, and would be satisfied by proof of that fact, and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse, and of his marriage, without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation, without proof of his marriage. Full proof of the offense charged in either indictment would not, therefore, of itself have warranted any conviction upon the other. The necessary consequence is, that assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second.

The authorities bearing upon the question are fully cited, compared, and discussed in the above case; among others the case of *Com.* vs. *Roby* (12 Pick., 496), in which it was ruled a conviction for assault with intent to murder did not bar a conviction for murder committed by the same act.

In the case of *The State* vs. *Elder* (65 Ind., 285) it is ruled:

> But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not neces-

sarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act.

See *Commonwealth* vs. *McShane* (110 Mass., 502) and authorities there cited; also *Shannon* vs. *Com.* (2 Harris Pa., 227.)

Where the evidence to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise. (1 Wharton's Crim. Law, Pr., Pl. and Ev., secs. 565 and 565*a*.)

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